IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

COMPANY PETITION NO.9 OF 1998
WITH
COMPANY APPLICATION NO.387 OF 2005

M/s. Star Enterprises. ..Petitioner.

Ms. Nita Solanki i/by Kiran Jain for the Petitioner.

Mr.Venkatesh Dhond as Amicus Curiae.

CORAM : A.M. KHANWILKAR, J.
DATED : 8TH JULY, 2005

P.C.:

1. Heard counsel for the petitioner/applicant and Mr. Dhond who is appointed as amicus curiae to assist the court. None appears for the other side.

2. Company Petition No.9 of 1998 has been filed by a Creditor under Section-433 and 434 of the Companies Act praying that the respondent company be ordered to be wound up. The petitioner herein and the company had entered into an agreement as a consequence of which respondent company became liable to pay to the petitioner. The liability was to the extent of Rs.45,792.86ps. As liability was not discharged inspite of the reminders and legal

notice, the petitioner eventually filed Summary Suit against the respondent company which was decreed exparte on 11.7.1997. The petitioner unsuccessfully attempted to get the decree executed. Eventually, the petitioner gave statutory notice to the respondent company on 8.10.1997 under Section 434 of the Act. In response to the statutory notice, one of the director of the respondent company informed the petitioner by letter dated 24.10.1997 that bankers of the respondent company M/s. Janata Sahakari Bank Ltd. Pune have taken possession of the company's property at Ratnagiri in terms of the mortgage and the said property was put to auction. Eventually, the present company petition came to be filed on 17.12.1997. Company Petition was admitted on 9.7.1998. Thereafter, admission of petition was advertised, as required in terms of the relevant provisions of the Act and the rules. The company petition came up for hearing on 16.7.2004, when the petitioner apprised the court that petitioner was not interested in pursuing the claim in view of the settlement arrived at between the petitioner and the respondent company during the pendency of the petition. This court however, directed the petitioner to publish advertisement of proposed withdrawal of the company petition within 12-weeks

there from. The petitioner failed to advertise the withdrawal even till the matter came up for hearing on 10.6.2005. On 10.6.2005, when the matter was called out, none appeared for the petitioner nor any document was placed on record to indicate that the advertisement of withdrawal has been published. In the circumstances, this court directed issuance of bailable warrant against the partner of the petitioner Mr. Hiren Bhupendra Goradia, in the sum of Rs.10,000/-, returnable on 30.6.2005, with further directions to remain present on the date of hearing. The petitioner thereafter, filed application being Company Application No.387 of 2005 on 22.6.2005 for recalling and setting aside the order dated 10.6.2005 issuing bailable warrant against the partner of the petitioner firm. The petitioner further claims that this court may dispense with the advertisement regarding withdrawal of the petition. The said application was taken up for hearing. At the relevant time representative of the petitioner to whom bailable warrant was issued was personally present in court. Accordingly, the order directing issuance of bailable warrant was suspended.

3. Be that as it may, as none appeared for the

respondent, this court thought it appropriate to request Mr.Dhond, Advocate, to appear as Amicus curiae, so as to assist the court especially on the issue as to whether the publication or advertisement regarding withdrawal of the company petition for winding up of the company, which has already been admitted, advertised and published, can be dispensed with.

4. The learned Amicus curiae has brought to my notice several provisions of the Companies (Court) Rules 1959. In substance, he submits that there is no express provision requiring advertisement of proposed withdrawal of the petition for winding up. In his submission, on conjoint reading of the relevant rules and Section 433 of the Act, it is amply clear that there is power to dispense with the advertisement or publication of withdrawal of the petition. But, contends learned Amicus curiae, the court, by way of prudence, would ordinarily insist for issuance of such advertisement or publication. Besides referring to the relevant provisions of the rules, the learned counsel has also invited my attention to the decision of our High Court reported in **A.I.R.1979 Bombay Page 5 in the case Keval P. Kashyap Vs. J.H. Jagtiant. That was, however, a**

case under the provisions of the Presidency Towns Insolvency Act,1909. Although there is no specific provision for advertisement of admission or for that matter withdrawal of the insolvency petition, this court has observed that, if the petitioner creditor informs the insolvency court about the settlement arrived at between the debtor and the creditor and seeks leave of the court to withdraw the petition, the court must proceed to ascertain if there are other creditors of the debtor and for that purpose must adjourn the matter and notify the same on the adjourned date under caption "for withdrawal". Relying on the above observations, the learned Amicus curiae contends that, it will be appropriate for the court to first ascertain whether other creditors are interested in pursuing the remedy which has already been invoked by the petitioner herein before this court and that can be done only if the court was to insist for publication/advertisement of the withdrawal of the petition. There is no other means for the court to ascertain that fact. The learned counsel also placed reliance on the decision in the case of **Sushiladevi and ors. Vs. Basuakha Singh and ors. reported in ILR 1973 Delhi 759.** In Para 4 thereof it had occasion to consider the scheme of admission

and disposal of winding up petition with reference to the provisions in Rules 99 to 102 of the Rules.

5. The counsel for the petitioner on the other hand contends that as there is power to dispense with the advertisement or publication of withdrawal of the petition; in the fact situation of the present case, that power be exercised in favour of the petitioner. Because, the claim of the petitioner, as set out in the petition, is nominal. Besides, the dispute has been amicably settled between the petitioner and the directors of the respondent company. It is further submitted that the respondent company is not functioning and is closed atleast since 2002 and there are no existing assets and properties of the respondent company. It is therefore, contended that the petitioner be permitted to withdraw the company petition without advertisement or publication of withdrawal.

6. I shall straight way deal with the request of the petitioner for withdrawal of the company petition. without requiring the petitioner to advertise or publish the withdrawal of the petition. To my mind, Having regard to the scheme of the provisions of the Act, the rules and the settled

legal position, there can be no doubt that once the petition for winding up is admitted the same is required to be advertised and published. That requirement can be deduced from Rule 24(2), 25 read with 499 of the Rules. Rule 24(2) plainly indicates that advertisement as required by the Rules regarding a petition to wind up a company is imperative. Rule 99 specifically deals with the winding up petition and provides that subject to any directions of the court, the petition shall be advertised within the time and in the manner provided by Rule 24 of the Rules. The advertisement is to be done in form No.48. Once such advertisement is issued, steps as can be taken to permit withdrawal of the petition have been successfully spelt out by the Delhi High Court in the case of **Sushiladevi and ors. Vs. Basakha Singh and ors. reported in ILR 1973 Delhi 759**. In Paragraph 4, it is observed thus :

> "After the advertisement has been made then the petition cannot be withdrawn except with the leave of the Court. Rule 100 of the Rules deals with the procedure for permitting the withdrawal of the petition for winding up which provides that the petition will not be allowed to be withdrawn before the date fixed in the advertisement for the hearing of the petition. The object of this Rule is to enable other creditors who wish to support the petition to be present at the date of

> hearing and, thus, to support the petition even if the original petitioning creditor or contributory wishes to withdraw the same or have it dismissed. In the conduct of company affairs it is quite often the case that the petitioning creditor is satisfied outside the court by the management of the company, sought to be wound up. Hence, in order to enable the winding up petition to be satisfactorily decided, a provision has been made to enable other creditors to support the petition even though the original creditor may be paid off and induced to withdraw the petition for winding up. Thus, if the original creditor withdraws his petition, then Rule 101 can be brought into operation and other creditors or other persons competent to maintain the petition may be permitted to be substituted as parties to the petition. In case such a contingency arises, then substitution has to be done in accordance with Rule 102.This procedure is to allow the new creditor who has been substituted to set out the grounds on which he supports the petition.Thus, in a case where a creditor brings a winding up petition on the ground of non payment of debts following a statutory notice and seeks to withdraw the petition, another creditor may be allowed to support the petition either on ground that he has served a statutory notice which has not been complied with or on account of a claim that the company is insolvent or for any other reason. This, in short, is the procedure to be followed in case substitution of a new creditor of the petitioning creditor is sought."

It follows that once winding up petition is admitted, advertised and published, the same will have to be taken to its logical end in terms of Section 443 of the Act. In the event the petitioner, who has invoked the remedy of winding up

is disinterested in prosecuting the petition, Rule 100 read with Rule 101 of the Rules provide for the course to be adopted by the Company Judge in that regard. Rule 101 reads thus :

> 101. Where a petitioner :-
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> (1) is not entitled to present a petition, or
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> (2) fails to advertise his petition within the time prescribed by these Rules or by Order of Court or such extended time as the court may allow, or
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> (3) consents to withdraw the petition, or to allow it to be dismissed, or the hearing to the adjourned, or fails to appear in support of his petition when it is called on in court on the day originally fixed for the hearing thereof, or any day to which the hearing has been adjourned , or
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> (4) If appearing, does not apply for an order in terms of the prayer of his petition,
>
> Or
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> Where in the opinion of the court there is other sufficient cause for an order being made under this rule.
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> the court may, upon such terms as it may think just, substitute as petitioner any creditor or contributory who, in the opinion of the court, would have a right to present a petition, and who is desirous of prosecuting the petition

It will be apposite to advert to Rule 100 which provides for application for leave to withdraw

petition. Rule 100 reads thus :

> "100. (1) A petition for winding up shall be withdrawn after presentation without the leave of the court.
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> (2) An application for leave to withdraw a petition for winding up which has been advertised in accordance with the provisions of rule 99 shall not be heard at any time before the date fixed in the advertisement for the hearing of the petition."

On conjoint reading of the above provisions, it would follow that once the winding up petition is admitted and advertised, the same cannot be heard at any time before the date fixed in the advertisement for the hearing of the petition. Indeed, later part of Rule 36 read with Rule 35 does indicate that once the petition is so advertised, it is not necessary to give notice of the adjourned hearing of such petition to any person. That, however, in my opinion, does not mean that when a formal application is made by the petitioner for withdrawal of the petition, long after the returnable date specified in the advertisement, it will not be necessary or proper to give notice or advertise and publish withdrawal of withdrawal of the petition. On the other hand, the consistent practice has been that once the winding up petition is admitted and

advertised, the same can be allowed to be withdrawn only after publication or advertisement of the withdrawal. That procedure secures the interest of the other creditors intending to prosecute the action, which ought to be the paramount consideration to be kept in mind by the company court before acceding the request of withdrawal of the petition. It is relevant to note that if other creditor or contributory interested in pursuing the action comes forward and is substituted as the petitioner, by virtue of deeming provisions in Rule 102, the amended petition of such other creditor or contributory is treated as the petition for the winding up of the company as if prosecuted. The legal consequence is that, by virtue of Section 441(2) of the Act, read with Section 536(2) any disposition of the property including actionable claims of the company, and any transfer of shares in the company or alteration in the status of its members, made after the commencement of the winding up shall be void unless the court was to otherwise order in that behalf. Besides, in terms of Section 447 of the Act, the effect of the winding up order operates in favour of all the creditors and the contributories of the company as if it had been made in the joint petition of a creditor and of a

contributory, if such is the scheme of the Act. As is rightly argued by the learned Amicus curiae, even though there is no specific provision regarding advertisement or publication of withdrawal of a winding up petition, unlike its admission, the court, by way of prudence ought to insist for that-requirement in the larger interest of all concerned. Ordinarily, therefore, compliance of advertisement of winding up petition ought to be insisted upon as a rule, inherent powers of the company court under Rule 9 notwithstanding.

7. In the present case, under its inherent present case, according to the petitioner, the claim amount in the petition is nominal and that the parties have amicably resolved their dispute that is other creditor has come forward after the advertisement of the admission of the petition coupled with the fact that there are no existing assets and properties of the respondent company; therefore, it will not be just and proper to require the petitioner to incur the expenses toward the advertisement of withdrawal of the petition. In my opinion, however, merely because claim of the petitioner is nominal or for that matter the other circumstances pressed into service, are not sufficient to depart from the

consistent practice followed in company jurisdiction- to require publication or advertisement of withdrawal of the winding up petition. More so because, in the present case, the company petition has been admitted as back as in 1998 and was expected to be heard on 13.5.1999 however, the same has remained pending; And whereas the request for withdrawal of the petition is made almost after six years from the advertisement of admission and hearing of the petition. In my opinion, due to efflux of time, it would be appropriate and prudent to require the petitioner to advertise withdrawal of the petition. Moreover, in the present case this court has already directed the petitioner to advertise withdrawal of this petition vide order dated 16.7.2004. There is no sufficient reason forthcoming why a different view should be taken so as to dispense with the advertisement, which course may be taken only in exceptional cases.

8. As I had made it clear to the counsel for the petitioner that it was not possible to dispense with the advertisement or publication of withdrawal of the petition, the learned counsel, on instructions of the authorised officer of the petitioner-firm, who is present in court, requested the court to

decide the matter on merits. Accordingly, now I proceed to consider the company petition on merits.

9. It is the case of the petitioner that pursuant to the agreement entered into with the respondent company and the transaction which took place consequent to that agreement, the respondent company became liable to pay certain amounts to the petitioner. As the said amounts were not made over inspite of repeated notices, petitioner eventually resorted to Summary Suit against the respondent-company which was decreed exparte on 11.7.1997. That suit has become final. The efforts made by the petitioner to receive the decretal amount by execution of the decree were not fruitful. Ultimately, the petitioner gave statutory notice to the respondent under Section 434 of the Act on 8.10.1997. In response to the statutory notice, one of the director of the company informed the petitioner that bankers of the company Janata Sahakari Bank Ltd. had taken the possession of the company's property which is at Ratnagiri, in terms of the mortgage arrangement between the parties. Even today, this petition has been filed by the petitioner on 17.12.1997, which has been admitted on 9.7.1998. The admission of this petition has been

duly advertised. However, inspite of service and advertisement of the petition, none appeared for the respondent nor any reply has been filed controverting the assertions made in the petition. In other words, the claim of the petitioner in this petition, has remained uncontroverted. It is evident from the record that the respondent company was liable to pay to the petitioner decretal amount in Summary Suit No.1194 of 1997. That amount has not been paid inspite of the statutory notice as well as admission of this petition. The legal presumption has remained unrebutted. In other words, the respondent company is unable to pay its debt.

10. Besides, according to the petitioner, the company has stopped all its operation and no production activity is going on in the factory atleast since 2002. The petitioner further states that there are no existing assets and properties of the respondent company.

11. If it is so, this court has no option but to answer the issue in favour of the petitioner that there is no plausible defence available to the respondent company much less bonafide and that the

respondent company has failed to rebut the presumption that it is unable to pay its debt. With this finding, petition for winding up of the company will have to be allowed.

12. While parting, I would like to place on record a word of appreciation for Mr. Dhond for having rendered able assistance as Amicus curiae, to able me to decide the legal issue as referred to earlier.

13. Accordingly following order is passed:

ORDER

a) Company Petition is made absolute in terms of prayer clause (a) and (b).

b) The Official Liquidator to forthwith take over the possession of the assets and properties of the respondent company, if any, and proceed in accordance with law.

c) Order dated 10.6.2005 of issuance of bailable warrant against one of the partner of the petitioner-firm is recalled. Company Application is disposed of accordingly.

(A.M. KHANWILKAR,J.)